93-938

Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

NATHAN LEWIN
(Counsel of Record)
D. BRADLEY CLEMENTS
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the court of appeals disregarded this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), when, without citing or discussing that case, it affirmed a 23-year term of imprisonment on tax and fraud charges imposed by a judge who refused to disqualify himself from presiding over a trial in which a principal complainant was a family company owned by "across-the-street" neighbors of the judge for 30 years and whose president, who testified as a prosecution witness for almost two trial days, was a friendly acquaintance of the judge and had contributed to the judge's political campaigns.

2. Whether the court of appeals, after acknowledging that it had erroneously invoked, in a criminal case, civil rules of procedure as a ground for ruling that petitioner had waived a claim that the evidence failed to support a guilty verdict, erroneously stood by its waiver ruling on the plainly mistaken ground that a defendant making a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure waives any factual insufficiency that he does not specifically describe.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

TABLE OF AUTHORITIES . . . . . (iv)

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

1. Introduction 3

2. The Original and Superseding Indictments 5

3. Judge Cleland Makes a Unilateral Disclosure 6

4. Judge Cleland Rejects Disqualification . . 9

5. Motions for Judgment of Acquittal 10

6. The Sentence 11

7. The Appeal 11

8. Petition for Rehearing 12

REASONS FOR GRANTING THE WRIT 13

1. This Court's Standard for Judicial Disqualification Articulated in *Liljeberg* Was Wholly Disregarded by the Courts Below 13

(a) Whether the judge was personally "obligated" to Mowat 14

(b) Whether the case was to be tried to a jury 15

(c) Whether the complaint or witness was a victim 15

2. The Court of Appeals' Belatedly Discovered "Waiver" Rationale Foreclosing Consideration of Petitioner's Challenge to the Sufficiency of the Evidence Conflicts with the Accepted Federal Rule 17

(a) The Conflict 17

(b) Inapplicability of Precedents 18

3. Summary Reversal Is Appropriate 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES:

Cage v. Louisiana,
498 U.S. 39 (1990) 20

Dennison Mfg. Co. v. Panduit Corp.,
475 U.S. 809 (1986) 20

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 20

In re Faulkner,—
856 F.2d 716 (5th Cir. 1988) 16

Freeport-McMoran, Inc. v. K N Energy, Inc.,
498 U.S. 426 (1991) 20

Gilbert v. United States,
359 F.2d 285 (9th Cir.)
cert. denied, 385 U.S. 882 (1966) 19

Hunter v. Bryant,
112 S. Ct. 534 (1991) 20

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1988) . . . . . *passim*

Mireles v. Waco,
112 S. Ct. 286 (1991) 20

Seaboard Air Line R. Co. v. United States,
382 U.S. 154 (1965) 20

Temple v. Synthes Corp.,
498 U.S. 5 (1990) 20

United States v. Atkins,
869 F.2d 135 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989) 14

United States v. Bilzerian,
926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991) 14

United States v. Brothman,
191 F.2d 70 (2d Cir. 1951) 19

United States v. Dodge,
983 F.2d 1069 (6th Cir.), *cert. denied*, 113 S. Ct. 2389 (1993) 18

United States v. Gjurashaj,
706 F.2d 395 (2d Cir. 1983) 18

United States v. Helmsley,
941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992) 14

United States v. Jones,
174 F.2d 746 (7th Cir. 1949) 18

United States v. LaRouche,
896 F.2d 815 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990) 14

United States v. McDonough,
603 F.2d 19 (7th Cir. 1979) 19

United States v. McMaster,
343 F.2d 176 (6th Cir.)
cert. denied, 382 U.S. 818 (1965) 19

United States v. Nachtigal,
113 S. Ct. 1072 (1993) 20

United States v. Rivera,
388 F.2d 545 (2d Cir.), *cert.*
denied, 392 U.S. 937 (1968) 18

STATUTES, REGULATIONS AND RULES:

18 U.S.C. § 1341 . . . . . 3, 5

26 U.S.C. § 6531 5

§ 7201 3

28 U.S.C. § 455(a) . . . . . *passim*

§ 1254 2

Fed. R. Crim. P. 29 . . . . . 4, 5, 10, 17, 18

No. 93 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALEX DANDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alex Dandy respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on June 7, 1993 and amended on August 11, 1993.

OPINIONS BELOW

The original decision of the United States Court of Appeals for the Sixth Circuit (App. A, pp. 1a-27a, *infra*) and the amendment to that decision (App. B, pp. 28a-33a, *infra*) are reported as one decision at 998 F.2d 1344. The Order of the District Court denying defendant's Motion for Disqualification of District Court Judge (App. C, pp. 34a-38a, *infra*) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was rendered on June 7, 1993. In response to a timely petition for rehearing and suggestion for rehearing en banc, the panel issued an amended decision on August 11, 1993. At the suggestion of the Court, the parties filed supplemental memoranda with respect to the petition for rehearing and suggestion for rehearing en banc. No judge requested a rehearing en banc and the petition for rehearing was denied by the original panel on September 15, 1993 (App. E, p. 41a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

2. Rule 29 of the Federal Rules of Criminal Procedure provides in relevant part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

STATEMENT

1. Introduction

After being found guilty by a jury on ten counts of an eleven-count indictment charging him with tax evasion (26 U.S.C. § 7201), mail fraud (18 U.S.C. § 1341), and other offenses growing out of arrangements under which he secretly benefited from rebates and other payments made by dairy and grocery suppliers who sought to supply his food market chains, petitioner was sentenced by the presiding judge, Hon. Robert H. Cleland, to a total of 23 years' imprisonment. On appeal, petitioner contended, *inter alia*, that the district judge should have disqualified himself under 28 U.S.C. § 455(a) because of a long-standing personal relationship with an important prosecution witness and with the family that owned one of the three suppliers that provided him with payments. Petitioner also claimed, with respect to two tax evasion counts, that the district judge should have granted his motion for judgment of acquittal.

Without discussing or citing this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (which had been cited by the petitioner in his appeal brief but was omitted from the government's brief), the court of appeals rejected petitioner's argument regarding the judge's disqualification because the case was tried to a jury and because the witness who was a friend of the judge "was simply one of many government witnesses" (App. A, p. 8, *infra*).

The court of appeals also rejected petitioner's argument that he was entitled to a judgment of acquittal on the tax-evasion counts because petitioner had failed to move, on this ground, for a new trial or for judgment notwithstanding the verdict. The court cited, as precedent, a civil case which it had decided in 1986.

In a petition for rehearing, petitioner urged the Court to reconsider his argument that the judge should have disqualified himself based on this Court's *Liljeberg* decision and also objected to the panel's reliance on civil-case precedent as a ground for finding he had waived the claim that he was entitled, under Rule 29 of the Federal Rules of Criminal Procedure, to a judgment of acquittal.

The court of appeals requested a response from the government, which again ignored totally this Court's *Liljeberg* decision. It also asserted that defense counsel's statement that he was making a "general renewal of our Rule 29 motions at the end of the case" waived the claim that there was no evidence of acts of evasion within the six-year limitations period.

The court of appeals then issued an amendment to its earlier opinion. It withdrew its discussion of civil procedure.

It did not, however, change its holding that petitioner had waived his argument for acquittal with respect to the tax evasion counts. Instead it relied on decisions that had found a waiver of a venue objection when defense counsel had specified grounds other than venue in his Rule 29 motion. The Court held that petitioner had waived his sufficiency-of-the-evidence challenge by not specifically arguing it to the district court in his Rule 29 motion. The amendment did not discuss the disqualification issue or cite the *Liljeberg* decision. In our view, the court of appeals plainly erred in both respects, and its decision should be vacated summarily and the case remanded for consideration of the issues that were pretermitted.

2. The Original and Superseding Indictments

Petitioner was first charged on December 14, 1990, in an 11-count indictment. The first two counts of the indictment alleged tax evasion for the years 1982 and 1983 in the filing of false tax returns on June 13, 1983, and July 3, 1984. Petitioner moved for dismissal of these counts on the ground that they were barred by the six-year statute of limitations, 26 U.S.C. § 6531. The prosecution responded with a superseding indictment filed on April 12, 1991, which added an allegation that petitioner had concealed and attempted to conceal records of unreported income (J.A. 45-47). [1]

Count Eight of the original and superseding indictments charged a scheme to defraud by use of the mails in violation of 18 U.S.C. § 1341. It alleged, *inter alia*, that petitioner had Chatham Supermarkets and Hamady Brothers Food Markets — two companies that he owned and controlled — purchase

---

[1] "J.A." refers to the three-volume Joint Appendix filed in the court of appeals.

dairy products from London's Farm Dairy, Inc., a wholesale supplier of dairy products. Count Eight went on to charge that, as a condition for these purchases, petitioner demanded that London's pay a "kickback" in the amount of $200,000 plus a percentage of London's profits to a dummy corporation that petitioner controlled, and that checks in varying amounts between $10,000 and $30,000 were regularly drawn by London's to the dummy corporation. (J.A., 39-40, 51-53) The key government witness with respect to this Count was Douglas Mowat, then President of London's Farm Dairy.

3. Judge Cleland Makes a Unilateral Disclosure

Approximately one month after the superseding indictment was returned, on May 14, 1991, counsel appeared for the purpose of arguing various motions. In chambers, the district judge advised counsel that he had noted the name of London's Farm Dairy, Inc., in the indictment, and he inquired whether any officer of London's would be testifying for the prosecution. He was told that Douglas Mowat would be a government witness. The judge then advised counsel of his long-standing personal relationship with the London family and with Mr. Mowat. In open court and on the record, Judge Cleland said (App. F, pp. 43a-44a, *infra*):

> At that time I notified both sides that I was acquainted with a person whom I since have been informed will be a witness in this case.
>
> This individual's name is Douglas Mowat, who is an executive with London Farm Dairy, Inc. which is a Michigan corporation with its headquarters, as I'm informed, its headquarters in Port Huron, Michigan.

I hale from Port Huron, Michigan, maintain a home there and have been acquainted with various members of the London family over the course of twenty -- closer, really, to thirty years.

I informed counsel that Glen London, one of the senior members of that family, was an across the street neighbor of my parents and myself when I was in college -- up through the time I was in college and law school. To my knowledge he's no longer associated with the corporation, I think he's retired from that. I may be incorrect, but in any event I'm acquainted with a friend of his.

Additionally, I am acquainted with a Michigan State representative named Terry London, who is from the Port Huron metropolitan area, Marysville, Michigan. He's not, to my knowledge, in any way associated with the corporation but is a -- I think he's a nephew of Glen London and his son or one of the other London brothers.

He's fulltime in public service, though, to the best of my knowledge.

Finally with respect to Douglas Mowat, this is an individual whom I have known for close to twenty years in one fashion or another, as he was working his way up through the corporate structure.

He and I, though we are on friendly acquaintance terms, have never socialized at one another's houses. We have commonly met, however, at community functions, dinners, testimonials, fund raisers and things of that nature over the course of years.

Before I took this job I was an elected official in St. Clare County, I was the prosecuting attorney of that county, and although I did not have political opposition in any of my campaigns, I did throw fund raiser celebrations annually. And although I'm not positive of it, I would expect that Mr. Mowat and probably his wife, quite likely others from the London organization, were contributors to my campaign to the tune of perhaps ten or twenty dollars apiece, something along those lines.

I expect that that was sporadic and not regular, and in no event do I think there was anything particularly significant about that -- significant financially about any of that.

I think I haven't seen Mr. Mowat in well over a couple of years now and certainly have not had any discussion with him over the facts of this case during any of this time.

Nor do I think I have discussed his business with him at all, quite frankly. I have discussed community affairs perhaps from time to time but not anything about London Dairy.

> Now, that in combination with the fact that I occasionally drink London's milk and eat London's ice cream puts the parties fully on notice, I think, as to — in terms of what the Court may personally have in the way of history on this affair.

After making this disclosure on the record, the district judge pressed defense counsel for a decision as to whether argument on the motions could continue before him. Counsel replied that he needed more time to consider the question and to do investigative work (App. F, p. 46a, *infra*). The judge replied that his feeling was that he was "far enough distant from any particular friendship or former association with Mr. Mowat or any of the others in the London organization" that he would not be influenced by any animosity that they would have against the petitioner (p. 47a, *infra*). The prosecutor then argued that the judge's acquaintance with Mowat would not have "any conceivable impact on the jury, which is going to be the finder of fact in this case" (p. 48a, *infra*) The judge replied, "The concern I would have from the defense side of this would be in the event of conviction and impending sentence" (p. 48a, *infra*).

4. Judge Cleland Rejects Disqualification

Petitioner moved two days later that Judge Cleland disqualify himself pursuant to 28 U.S.C. § 455(a). On May 30, 1991, the district judge denied the motion, principally on the ground that the case would involve a jury trial, so that the judge would not be ruling on the credibility of the witness who was his acquaintance. The judge also rejected petitioner's concerns regarding his possible bias in sentencing (a concern he himself had raised) noting erroneously that any sentence would be subject to the "leveling and objectifying

effect" of the Sentencing Guidelines. (App. C, p. 37a, *infra*). In fact, the alleged offense was committed before November 1, 1987, and the Guidelines are inapplicable, as the judge recognized when sentencing Mr. Dandy to 23 years' imprisonment (J.A. 761). The judge neither cited nor discussed this Court's decision in *Liljeberg* in his 5-page Order. See App. C, pp. 34a-38a, *infra*.

5. Motions for Judgment of Acquittal

The trial was conducted between September 11, 1991, and November 20, 1991. At the conclusion of the prosecution's case, defense counsel moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Defense counsel relied on the written motion regarding the statute of limitations that had been filed before the return of the superseding indictment and stated that "[a]t the time we made the motion prior to trial, we did not have the testimony of . . . the most critical witness with regard to the government's position that the statute of limitations was extended with regard to Counts 1 and 2 . . . ." (App. G, p. 53a, *infra*). Counsel then went on to explain why the testimony of "the most critical witness" regarding alleged acts of evasion within the limitations period could not support a guilty verdict (pp. 53a-54a, *infra*). He argued that there was insufficient evidence that any acts of evasion had occurred within the six-year limitation period. The prosecutor responded with his own analysis of the testimony, and the judge agreed with the prosecutor (pp. 54a-56a, *infra*).

At the conclusion of all the evidence, defense counsel renewed the Rule 29 motion. He said, at that time, that he was entering "a general renewal of our Rule 29 motions" (Transcript, Vol. 36, p. 9). The district judge denied the motion.

6. The Sentence

Following his conviction, petitioner was sentenced by Judge Cleland on May 22, 1992. The judge imposed a sentence of 23 years' imprisonment — three years each on counts 1, 2, 3, 6, 8, 9 and 10 and two years on count 11. The sentences were to run consecutively (J.A. 768-69). No sentence was imposed on counts 4 and 5, which were lesser included offenses.

7. The Appeal

Petitioner's principal argument on appeal was that Judge Cleland should have recused himself under 28 U.S.C. § 455(a). The government's brief in the court of appeals did not cite or discuss this Court's *Liljeberg* decision. (The full argument in the government's brief is reprinted as App. H, pp. 57a-61a, *infra.*)

Petitioner also claimed on appeal that the evidence was insufficient to support a guilty verdict on Counts 1 and 2 because there was no evidence of acts of evasion within six years prior to return of the superseding indictment. The prosecution did not claim that the argument was waived. It argued only that there was evidence of evasion within the limitations period. Brief for the United States, pp. 37-38.

The court of appeals refused, however, to consider the sufficiency of the evidence. Its full discussion of this issue was as follows (App. A, p. 23a, *infra)*:

> Defendant next argues that evidence of affirmative acts of evasion within the statutory period is insufficient to sustain his conviction on Counts 1 and 2. This issue is reviewed on

> appeal from the district court's ruling on either a motion for a new trial or a motion for judgment not withstanding the verdict. *Dixon v. Montgomery Ward*, 783 F.2d 55 (6th Cir. 1986). Defendant does not claim nor does the record reveal that defendant has made either motion. Therefore, we decline to consider this issue.

On the disqualification question, the court of appeals held that the district judge's decision was reviewable only for abuse of discretion. It found that the witness, Douglas Mowat, was merely an acquaintance and not a personal friend of Judge Cleland and that the judge was "not called upon to evaluate the credibility of Mowat because defendant Dandy was tried by a jury" (App. A, p. 8a, *infra*). The court also observed that Mowat was only one of many government witnesses and "did not have a personal stake in the outcome" (p. 8a, *infra*). In support of the last proposition, the court of appeals cited a district court ruling in a civil case. *Liljeberg* was not cited or discussed.

8. Petition for Rehearing

Petitioner noted in his petition for rehearing that the civil rules invoked by the court of appeals as a basis for its finding of waiver did not apply in a criminal case. Petitioner also sought rehearing on the disqualification issue and again cited and discussed the *Liljeberg* decision.

The court of appeals directed the prosecution to respond to the petition. The prosecution's response did not discuss *Liljeberg*. It did, however, argue that the motion for judgment of acquittal regarding Counts 1 and 2 had been

waived because it was not elaborated during defense counsel's argument.

On August 11, 1993, the court of appeals amended its opinion by deleting the paragraph that had invoked the procedures applicable to civil cases and substituting an extended section that held that the motion for judgment of acquittal based on insufficiency of the evidence had been waived. The court relied on decisions that had found waiver of an objection to venue where that objection was not specified in a motion under Rule 29.

Petitioner was then asked whether, in light of this amendment, he wished "the petition for en banc reconsideration . . . to be withdrawn." (App. D, p. 39a, *infra*). Petitioner persisted in seeking *en banc* reconsideration and rehearing, and both were denied on September 15, 1993 (App. E, p. 41a, *infra*.).

REASONS FOR GRANTING THE WRIT

1. This Court's Standard for Judicial Disqualification Articulated in *Liljeberg* Was Wholly Disregarded by the Courts Below.

This Court twice heard argument in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and rendered an authoritative judgment in that case requiring a judge to disqualify himself whenever there is even an *appearance* of partiality or impropriety by reason of his participation. The principles set forth in *Liljeberg* were disregarded *in toto* in this case, to the extent that this Court's decision was never discussed or even cited by either the

district court or the court of appeals. And the prosecution, which vigorously urged Judge Cleland to remain in the case from the very early stage when he disclosed his friendship with the London family and with Mr. Mowat through his imposition of an extraordinarily harsh 23-year term of imprisonment, [2/] also failed to consider or present to the court the standards of the *Liljeberg* decision. Instead, Judge Cleland rejected the request that he disqualify himself, and the court of appeals found that his conclusion was not an "abuse of discretion," for several reasons that ignore the prophylactic purpose of 28 U.S.C. § 455(a) — "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." 486 U.S. at 865.

(a) **Whether the judge was personally "obligated" to Mowat** — The court of appeals' first stated ground for permitting Judge Cleland to preside over the case was that the judge did not have an "intimate, personal relationship" with Mowat or one in which he was "obligated" to Mowat (App. A, p. 8a, *infra*). But under the *Liljeberg* standard that emphasizes the "appearance of impropriety," the judge's subjective "obligation" is irrelevant. *Liljeberg* makes clear that "[s]cienter is not an element of a violation of § 455(a)." 486 U.S. at 859. The judge's many years of friendship with Mowat, added to the fact that Mowat had contributed to the

---

[2/] By contrast, the jail terms imposed in other celebrated recent tax evasion cases have been far smaller. See, *e.g.*, *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991)(Leona Helmsley sentenced to four years for 33 counts of tax evasion and mail fraud); *United States v. LaRouche*, 896 F.2d 815 (4th Cir. 1990)(Lyndon LaRouche sentenced to 15 years for 13 counts of mail and tax fraud involving over $30 million in loans); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)(inside trader sentenced to four years for nine counts of tax and securities fraud); *United States v. Atkins*, 869 F.2d 135 (2d Cir. 1989)(Charles Atkins sentenced to two years for supervising tax fraud scheme involving hundreds of millions of dollars in false tax deductions for investors).

judge's political campaigns and that he headed the business of a family that was a neighbor of the judge's, would cause an objective observer to question the judge's impartiality. *Id.* at 861. This is particularly true since Mowat testified that petitioner had forced him to pay large kickbacks from the funds of London's Farm Dairy.

(b) **Whether the case was to be tried to a jury** — In his initial statement immediately following disclosure of his relationship to the London family and to Mr. Mowat, as well as in his order denying the disqualification motion, Judge Cleland relied on the fact that petitioner was to be tried by a jury. The court of appeals also invoked this ground for affirming the judge's conclusion. There is no indication, however, in Section 455(a) or in this Court's *Liljeberg* opinion, that the identity of the trier of fact makes any difference whatever in determining whether there is an *appearance* of partiality or impropriety in a particular judge's participation in a case. The identity of the trier of fact may affect *actual* prejudice; it does not bear upon appearances.

(c) **Whether the complainant or witness was a victim** — The court of appeals concluded its discussion of this issue by refuting the proposition that London's or Mowat was a "victim" of petitioner's alleged offense. The extent to which a witness was "victimized" by the defendant is not, however, the critical question in determining whether there was an appearance of impropriety. What is important is that the Londons had been acquaintances of the judge for over twenty years, that one London was a long-term neighbor of the judge, that the current president of the company — who was to testify as a government witness — had been a friendly acquaintance for many years and had contributed to the judge's political campaigns, and that the firm and its president were aligned with the prosecution in this case.

Petitioner's counsel attempted to establish at trial that Mr. Mowat had lied in his grand jury testimony and was, therefore, also lying at trial (Transcripts, Vol. 11, pp. 40-42, Vol. 34, pp. 118-131, Vol. 35, pp. 13-15). The image of Judge Cleland presiding over proceedings in which Mowat's credibility was attacked is surely one that — given their personal relationship — does not enhance the appearance of justice administered in federal courts. In his sentencing, the judge excoriated petitioner for "intimidat[ing] and financially seduc[ing] merchants." (J.A. 764) The judge's acquaintance, Mr. Mowat, was one of three merchants so "seduced." The *appearance* of partiality certainly exists, in these circumstances, when the trial judge imposes a 23-year prison term, as Judge Cleland did. Indeed, when the issue of disqualification first arose, the judge himself acknowledged that his concern was "in the event of conviction and impending sentence" (App. F, 48a, *infra*).

A fair application of *Liljeberg* would have resulted in Judge Cleland's disqualification. Indeed, under similar circumstances, the Fifth Circuit, recognizing "the strictness with which section 455 is to be applied," held that a district court judge should have disqualified himself "despite the total absence of any showing of actual bias." *In re Faulkner*, 856 F.2d 716, 720-21 (5th Cir. 1988). In *Faulkner*, the judge's cousin had participated in transactions forming the basis of the indictment and there was a possibility that she would be called as a witness. Although the court emphasized that it did not question the judge's ability to preside over the case even-handedly, it held that disqualification was required because "'his partiality might reasonably be questioned' by a reasonable observer." *Id.* at 721. These same concerns apply here, particularly in view of the very early stage when the question was raised. At the time, motions addressed to the

indictment had not even been argued, and the case could, with great facility, have been reassigned.

This Court should grant certiorari and vacate the judgment below to reaffirm that *Liljeberg* means what it says and that it must be followed and obeyed by the lower courts. The decision of the courts below is such an extreme departure from the standards of *Liljeberg* that the decision must be reversed not only to achieve justice here but to "prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 868.

2. The Court of Appeals' Belatedly Discovered "Waiver" Rationale Foreclosing Consideration of Petitioner's Challenge to the Sufficiency of the Evidence Conflicts with the Accepted Federal Rule.

Having mistakenly relied on a procedural proposition applicable only to civil cases when it first sought to avoid passing on the sufficiency of the evidence to sustain Counts 1 and 2, the court of appeals stood its ground on the petition for rehearing by invoking another waiver principle that is both demonstrably wrong and demonstrably inapplicable. If taken at face value, the court of appeals' extraordinary holding that a challenge under Rule 29 to the sufficiency of the evidence is waived if it is not spelled out in detail in counsel's oral presentation conflicts with decisions of the Second and Seventh Circuits, and is even contradicted by another Sixth Circuit ruling.

(a) **The Conflict** — In the amendment to its opinion dated August 11, 1993, the court of appeals held that "where a Rule 29 motion is made on specific grounds, all

grounds not specified are waived" (App. B, p. 31a, *infra*). That legal proposition conflicts with the rule applicable in the Second Circuit. See *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)("defendants [need] not cite chapter and verse of the weakness of the case against them"). In *Gjurashaj*, the defendants moved for a judgment of acquittal under Rule 29 and did present argument with respect to the government's failure of proof. The government argued that because they had not referred to a particular count and had not delineated the failure of proof as to that count, the defendants waived that issue. The Second Circuit firmly rejected this argument. *See also, United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949)("the defendant is not required to go over the proof for the benefit of the Government or the court, in the absence of some request for more specific objection"). And the Sixth Circuit has itself had applied the *Gjurashaj* and *Jones* cases in *United States v. Dodge*, 983 F.2d 1069 (6th Cir. 1993).

The interpretation of Rule 29 applied in this case by the Sixth Circuit has highly undesirable consequences. It means that a defense counsel must, at the time of making a Rule 29 motion, elaborate equally *all* possible grounds for a judgment of acquittal. This requirement will unduly extend trials and, in certain cases, result in the unexpected foreclosure of valid claims that trial lawyers — familiar with the ground-rules before this case — believed would be considered.

(b) Inapplicability of Precedents — The judicial precedents cited by the court of appeals in its amended opinion are inapplicable to this case. All the cited cases held that if a defendant moves under Rule 29 for a judgment of acquittal on specific grounds and fails to mention venue, the objection to venue is waived. See *United States v. Rivera*,

388 F.2d 545, 546 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968); *Gilbert v. United States*, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966); *United States v. Brothman*, 191 F.2d 70, 72-73 (2d Cir. 1951) (dictum); *United States v. McMaster*, 343 F.2d 176, 181 (6th Cir.), *cert. denied*, 382 U.S. 818 (1965). These cases did not extend this doctrine beyond the specific issue of venue. As the Seventh Circuit specifically emphasized in *United States v. McDonough*, 603 F.2d 19, 22 (7th Cir. 1979), when it adopted this rule:

> Venue is different from other evidentiary issues raised at the time of the motion for acquittal. The Constitution makes proof of venue a part of the Government's case, but the defendant may waive this right. It is not an essential fact constituting the offense charged . . . and need only be proved by a preponderance of the evidence.

The court of appeals invoked this inapplicable rule in an effort to sustain the decision it had previously reached not to examine the sufficiency of the evidence to support Counts 1 and 2. The waiver rationale that the court utilized is simply inapplicable to the facts of this case, and, for that reason, the case should be remanded for a decision by the court below on the merits of petitioner's challenge to the sufficiency of the evidence. [3/]

[3/] The Sixth Circuit ruling is all the more inexplicable given that petitioner's counsel *did* specifically argue in the trial court that the evidence was insufficient to show acts of evasion within the limitations period — precisely the issue the Court of Appeals strained legal precedents to find waived. See App. G, pp. 52a-54a, *infra*.

3. Summary Reversal Is Appropriate.

The two errors we have discussed render petitioner's 23-year prison term singularly unjust. He should have been tried and sentenced before a different judge. At least, the trial judge and the court of appeals should have accorded greater weight than they did to the *appearance* of partiality or impropriety. Moreover, the court of appeals should have examined petitioner's claim that the evidence was insufficient, in light of the statute of limitations, to find him guilty of tax evasion for the years 1982 and 1983.

Both of these issues can be resolved summarily, without plenary briefing and argument. It is clear from the opinions below, as well as from the relevant portions of the government's argument and appellate brief, that this Court's *Liljeberg* decision was simply ignored by the courts below and by the government. It is also clear that the stated ground for failing to review the sufficiency of the evidence on Counts 1 and 2 is untenable. This Court could, therefore, without setting the case for briefs and argument, vacate the judgment and remand the case to the court of appeals for it to consider and apply *Liljeberg* and to weigh the adequacy of the evidence on Counts 1 and 2. Compare, *e.g.*, *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986); *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965). *See also*, *United States v. Nachtigal*, 113 S. Ct. 1072 (1993); *Espinosa v. Florida*, 112 S. Ct. 2926 (1992); *Hunter v. Bryant*, 112 S. Ct. 534 (1991); *Mireles v. Waco*, 112 S. Ct. 286 (1991); *Freeport-McMoran, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991); *Cage v. Louisiana*, 498 U.S. 39 (1990); *Temple v. Synthes Corp.*, 498 U.S. 5 (1990).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the judgment of the court of appeals should be vacated.

Respectfully submitted,
NATHAN LEWIN
(Counsel of Record)
D. BRADLEY CLEMENTS
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D. C. 20037
(202) 293-6400

December 1993

Attorneys for Petitioner